IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-931

BRUCE BABBITT, GOVERNOR OF THE STATE OF ARIZONA, ET AL.,
Defendant Appellants,
AND
ARIZONA FARM BUREAU FEDERATION,
AN ARIZONA CORPORATION, ET AL.,
Intervenor Appellants,

versus

UNITED FARM WORKERS NATIONAL UNION,
ON BEHALF OF ITSELF AND ITS MEMBERS, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Brief *Amici Curiae* of Mountain States Legal Foundation; Southeastern Legal Foundation; Mid-America Legal Foundation; Great Plains Legal Foundation; and Mid-Atlantic Legal Foundation; in Support of Intervenors' Jurisdictional Statement and on the Merits

MOUNTAIN STATES LEGAL FOUNDATION
JAMES G. WATT
MAXWELL A. MILLER
1845 SHERMAN STREET, SUITE 675
DENVER, COLORADO 80203

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

CONSENT FOR FILING

Mountain States Legal Foundation is a nonprofit, independent public interest legal foundation. The Foundation is supported entirely from donations and is dedicated to legal advocacy of values and concepts of individual freedom, the right to private property and the private enterprise system. The Foundation frequently intervenes in lawsuits of widespread public interest, including civil rights litigation, and the constitutional questions relating to those issues. The Foundation's role in future civil rights litigation is directly affected by the outcome of this case.

The Foundation, in its own name and on behalf of other public interest law centers throughout the country similarly affected, including the Southeastern Legal Foundation; the Mid-America Legal Foundation; the Great Plains Legal Foundation; and the Mid-Atlantic Legal Foundation; submit this brief as *amici curiae* in support of the intervenors' Jurisdictional Statement and on the merits.

The plaintiffs, defendants and defendant-intervenors have given written consent for the Foundations herein to file a brief as *amici curiae*. Copies of these written consents have been filed with the clerk.

JURISDICTION AND SIGNIFICANCE

Defendants and intervenors bring this appeal pursuant to 28 U.S.C. §1253.[1] A more detailed explanation of jurisdiction and disposition of this case in the District Court is left for them to make. This brief also intentionally omits an exhaustive discussion of the "state action" issue of 42 U.S.C. §1983[2] explained in the respective jurisdictional statements filed by the defendants and the intervenors.[3] It is obvious, however, that the interpretation of section 1983 as it applies to the Civil Rights Attorneys' Fees Award Act of 1976 (42 U.S.C. §1988)[4] (the substance of the "state action" issue) was pivotal to the entire attorneys' fee question, in the lower court. If this Court agrees with the lower court and concludes that state action is not necessary for an attorneys' fee award under section 1988, as it applies to section 1983, the amici believe that the lower court's assessment of attorneys' fees against intervenors is nonetheless unconstitutional.

[1]The complete text of 28 U.S.C. §1253 (1970) reads:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

[2]The complete text of 42 U.S.C. §1983 (1976) reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[3]Plaintiffs brought this action under section 1983, though *all concede* that intervenors had not acted under color of state law. In essence, the lawsuit is and was intended solely as a facial challenge to the constitutionality of the AERA. There is no "state action" on the part of intervenors to deprive plaintiffs of their civil rights. Consequently, intervenors argue that section 1988, the only conceivable basis for an attorneys' fee award, does not apply to this case because section 1983 does not apply to them.

Mountain States Legal Foundation and the other amici concur in this position and believe that the argument is dispositive of the attorneys' fee issue.

The purpose of this brief is to convince the Court that it should note probable jurisdiction and consider the attorneys' fee issue on the merits because:

1. The legality and propriety of taxing attorneys' fees against intervenors in a civil rights action is, by the lower court's own admission, "a case of first impression." *United Farm Workers National Union, et al., v. Bruce Babbitt, et al.*, No. 72-445 (D. Ariz. 1978) (order granting plaintiffs' Motion for Attorneys' Fees).

[4]42 U.S.C. §1988 (1976) reads in pertinent part:

> . . . In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

2. The question involves significant deterrents to first amendment freedoms of speech and expression. An affirmation of the lower court's ruling, that intervenors can be held liable under section 1988 for attorneys' fees, even though they had not acted under color of state law, is an impermissible threat to the constitutional rights of public interest groups, like this Foundation, and other interest groups dedicated to courtroom advocacy of civil rights. The well-established rights of such organizations to advocate political viewpoints in court is, by the lower court's decision, placed in jeopardy.

3. The question involves significant issues of public policy. Should the lower court's decision be affirmed, public interest groups would understandably be reticent to intervene in a civil rights action because of the chilling impact of possible liability for counsel fees. Hence, the judiciary in similar cases may not have a full and balanced presentation of competing interests. The voice of many interested organizations and associations will not be heard on matters of widespread public interest.

The adverse impact of the lower court's decision on the freedom of advocacy for public interest groups and their future role in civil rights litigation warrants consideration by this Court of the arguments herein. Amici suggest that the following questions are raised by the Jurisdictional Statement filed by intervenors.

QUESTIONS PRESENTED

1. Does the lower court's assessment of attorneys' fees against the intervenors violate their first amendment rights to freedom of speech?

2. Is the lower court's ruling contrary to law and the philosophy of government, as expressed by the framers of the Constitution, the courts and the Congress?

SUMMARY OF ARGUMENTS

The order of the lower court should be reversed. This can and should be done by holding that state action, *in lawsuits brought under section 1983*, is a prerequisite for an attorneys' fee award under section 1988.

If this Court concludes that state action, in *lawsuits brought under section 1983*, is not a prerequisite for an attorneys' fee award under section 1988, the lower court's order nonetheless violates intervenors' constitutional rights and should be reversed. Recent Supreme Court cases hold that freedom of political expression is protected by the First Amendment to the Constitution against legal impediments. The intervenors' right to assist the State of Arizona in a vigorous defense of the AERA falls within the ambit of these cases and should be protected against the deterrent effect of possible liability for attorneys' fees.

The assessment of attorneys' fees against the intervenors is also contrary to Congressional intent and the philosophy of American government. The framers of the Constitution, the courts and Congress have sought to encourage representation of public interests. Both the courts and Congress have specifically expressed a policy protecting good faith plaintiffs bringing a civil rights action from the possible liability for attorneys' fees, ex-

cept when a suit is brought merely to harass or annoy the defendant. Defendant-intervenors may represent public concerns, as can plaintiffs, and should be afforded the same protection.

ARGUMENT

I.

THE LOWER COURT'S AWARD OF ATTORNEYS' FEES AGAINST INTERVENORS VIOLATES THEIR FIRST AMENDMENT FREEDOMS OF SPEECH.

The scope of first amendment freedoms has in recent years been held to include advocacy of political values in the courts.[5] The most relevant cases analogous to the case at bar are *NAACP v. Button*, 371 U.S. 415 (1963); the follow-up case of *In re Edna Smith Primus*, 436 U.S. 412 (1978), and *California Motor Transportation Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). All three of these cases, and the precedent cases upon which they were decided, speak to the issue of deterrents to freedom of speech and freedom of political advocacy before the judiciary. The common theme to all three cases is that legal impediments to freedom of advocacy in the courts are unconstitutional, except in very narrow circumstances. The facts of each case involve a plaintiff's right of advocacy before the courts, but have equal application to the defendant-intervenors in the case at bar.

---

[5]*Sweezy v. New Hampshire*, 354 U.S. 234 (1975); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

In *Button*, the Court struck down a Virginia statute which proscribed the "improper solicitation of any legal or professional business". 371 U.S., at 415. The statute as applied to the plaintiff, NAACP, was, the Court found, a significant deterrent to the association's first amendment freedoms in vigorous advocacy of lawful objectives. Despite an uncontested finding that the NAACP had openly violated the statute, the Court concluded that:

> In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in the country. It is thus a form of political expression. 371 U.S., at 417.

Later in the opinion, the Court articulated the importance and scope of appellant's first amendment freedoms. "These freedoms," wrote the Court, "are delicate and vulnerable, as well as supremely precious in our society. The *threat of sanctions* (emphasis added) may deter their exercise almost as potently as the actual application of sanctions." *Id.* Any regulation of expression and association, the *Button* Court insisted, must be done "only with narrow specificity". Id., at 433. The point of *Button* with respect to the case at bar is that state regulations (such as disciplinary rules) intended to benefit certain groups or promote a state interest are nevertheless unconstitutional if they also deter an individual's freedom of *political expression* before the courts.

In the subsequent decision of *In re Edna Smith Primus, supra*, the Court endorsed the *Button* doctrines explained above and refined their application. In *Primus*, the appellant, an ACLU lawyer, solicited plaintiffs in violation of Disciplinary Rules of the Supreme Court of South Carolina. Appellee, the Board of Commissioners of the Supreme Court of South Carolina, sought to distinguish *Button* by claiming: first, that the ACLU unlike the NAACP is not primarily a "political" organization but "has as one of its primary purposes, the rendition of legal services". 436 U.S., at 427; quoting 233 S.E.2d, at 303; second, "that the ACLU's policy of requesting an award of counsel fees indicated that the organization might benefit financially in the event of successful prosecution of the suit for money damages". *Id.* The *Primus* Court found both distinctions unpersuasive and irrelevant. As to the first, the Court merely reiterated *Button* doctrine that for the ACLU, as for the NAACP, "litigation is not a technique of resolving private differences, it is a form of political expression and political association". 371 U.S., at 429, 431. Neither did the Court entertain "any suggestion that the level of constitutional scrutiny should be lowered because of possible benefit of the ACLU". 436 U.S., at 428. In other words, as applied to this case, the appellant intervenors are entitled to active and meaningful participation in advocating their belief in the constitutionality of the AERA, without the threat of paying for the views of their opponents, irrespective of the possibility of pecuniary gain. The only caveats to that rule are explained in *California Transport v. Trucking Unlimited*, 404 U.S. 508, 515 (1972), and *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978). The first

amendment protection of political advocacy does not, under *Trucking Unlimited*, extend to "mere sham(s) to cover what is actually nothing more than an attempt," *Eastern R. Conf. v. Noerr Motors*, 365 U.S. 127, 144 (1961), "by a group of attorneys to evade a valid state rule against solicitation for pecuniary gain". 436 U. S., at 428, n. 20. Neither does the first amendment protect in-person solicitation by lawyers for pecuniary gain. *Ohralik, supra.*

Both exceptions are inapplicable to the case at bar. No one maintains that the intervenors' defense of the AERA was a "sham," and the *Ohralik* exception applies to bad faith lawyers and not good faith intervenors.

Any argument that a possibility of pecuniary gain to the intervenors denies them the protections of *Button* flies in the teeth of policies embraced in *Primus*. The *Primus* Court declared that:

> . . . in a case of this kind there are differences between counsel fees awarded by a court and traditional fee paying arrangements which militate against a presumption that ACLU sponsorship of litigation is motivated by consideration or pecuniary gain rather than by its widely recognized goal of vindicating civil liberties. 436 U.S. 429.

Intervenors in this case, it can be argued, may gain monetarily if the AERA is upheld in the sense that their business interests will be better pro-

tected than if the law is struck down. But advocacy need not be entirely free from economic overtones to be political. Moreover, it should be stressed that intervenors did not seek attorneys' fees. Their singular objective was to assist the State of Arizona in defending the AERA's constitutionality.

Finally, the *Primus* case, speaking in the context of possible exceptions to *Button* emphasizes that attorneys' fees should not be awarded absent specific statutory authorization, or a showing of bad faith in the conduct of litigation. In *Primus*, it was argued that ACLU's traditional plaintiff role in seeking attorneys' fees was a sufficient justification for upholding the South Carolina rule against solicitation and denying the ACLU freedom of expression. The Court disagreed. In the case at bar, the plaintiffs now argue that there is sufficient justification to deny the intervenors freedom of speech. Certainly, plaintiffs cannot always have it their way. If *Button* and *Primus* protect plaintiffs in their free speech rights against legal deterrents, the same holding ought to be extended defendant-intervenors.

II. (A)
THE LOWER COURT'S DECISION TO ASSESS INTERVENORS FOR ATTORNEYS' FEES IS CONTRARY TO THE PHILOSOPHY OF GOVERNMENT EXPRESSED BY THE FRAMERS OF THE CONSTITUTION.

A basic tenet of American political philosophy is that a balanced presentation in issues of widespread public interest promotes the good of society. In drafting the Constitution, the framers specifically designed our system to insure the viability

of that tenet and guard against what James Madison called the "mischief of factions".[6] In Federalist No. 10, Madison wrote that a principal defect in the Articles of Confederation was that "our governments are too unstable, that *the public good is disregarded in conflicts of rival parties* (emphasis added) and that measures are too often decided, not according to the rules of justice, and the rights of a minority party, but by the superior force of an interested and overbearing majority".[7]

Madison's concern was with the entire governmental system. Concededly, Federalist No. 10 is not talking about the role of public interest groups before the judiciary. But the theme of Federalist No. 10 is that government is weakened when factions can control policy absent representation from other groups. The mischief of factions, by which he meant "a number of citizens whether *amounting to a majority or minority* . . . (emphasis added) are united by a common impulse of passion,"[8] is that their militant nature often controls the public policy for a silent majority. Madison saw only two cures for the mischief of factions: The first was to destroy the liberty by which they flourished, which he rejected, and the second was to control their effects by adopting a system to insure that opposing voices are heard.

---

[6] *The Federalist No. 10* (J. Madison) at 77 (Mentor, 5th ed. 1961).

[7] *Id.*

[8] *Id.*, at 78.

Though Federalist No. 10 was written to elucidate "the numerous advantages of a well-constructed Union,"[9] its arguments are likewise pertinent here. The role of the judiciary in formulating public policy is recognized by cause-oriented public interest groups. During the past decade more than 100 "public interest" law centers, including Ralph Nader's Public Citizen Litigation Groups, the Environmental Defense Fund, Natural Resources Defense Council, the Sierra Club Legal Defense Fund and the Foundations sponsoring this *amici* brief have been founded. All presume to speak in the best interests of society, though they may conflict in viewpoint. Vital public policy issues are, therefore, often decided by the judiciary; an aggressive plaintiff or defendant, though he or she may represent a narrow viewpoint, can advocate causes affecting public policy often without input from other interested parties. The danger of a fragmented society is then real if the broad public interest is disregarded in conflicts of rival special interest groups.

In this case, if good faith intervenors are made to finance the expression of UFW political beliefs as well as their own, the fragmentation of society (through inconsistent adjudications or adjudications absent interested parties) becomes all the more a relevant concern in future civil rights policy decided by federal courts. By sustaining the lower court's award of attorneys' fees, this Court would ring the death knell to civil rights representation by public interest groups in cases similar to this. The consequences of that to society are far-

[9] *Id.*

reaching. Vast segments of the public, from the poor litigant to the average middle class citizen, would have a weakened voice in the courts.

Similarly, the state efficacy in defending its own laws is undermined. If the state does not defend its laws or for some reason does not have resources available for their vigorous defense, the stability of society is weakened by special interest groups seeking to invalidate its laws. As in this case, intervenors representing large segments of public interest supplemented the efforts of the state, and indeed "were a driving force, if not the main force in defense of this suit, as they had substantial interests to protect". *United Farm Workers National Union, et al., v. Bruce Babbitt, et al., supra.* Certainly, plaintiffs have the right to challenge the AERA, but equally important, and usually overlooked, is the duty of the state to defend its own laws which presumably represent the will of the people. Intervenors, by their vigorous defense of the AERA, assisted the State of Arizona in defending its laws and thereby fulfilled an important role in our society which must be allowed and encouraged.

II. (B)
BOTH THIS COURT AND CONGRESS HAVE SOUGHT TO ENCOURAGE PUBLIC INTEREST REPRESENTATION BY LIMITING ATTORNEYS' FEE AWARDS TO NARROW CIRCUMSTANCES.

Under the traditional American rule, the federal judiciary has refused to award attorneys' fees absent statutory authority. Recent decisions by this Court have refined the rule's application:

In *Christiansburg Garment Co. v. E.E.O.C.*, 434 U. S. 412 (1978), this Court held that under Title VII of the Civil Rights Act of 1964 [42 U.S.C. §2000e - 5(k)] a Federal District Court could in its discretion award attorneys' fees to a prevailing *defendant* only upon a finding that the plaintiffs' action was frivolous, unreasonable, or brought in bad faith. This Court has also held in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975) that without specific statutory or contractual authority to the contrary, or a showing of "bad faith," litigants must pay their own way.

As stated in Senate Report No. 94-1011, the purpose of the Civil Rights Attorneys' Fee Award Act of 1976 (42 U.S.C. §1988) was to amend the Civil Rights Act of 1866, Revised Statutes Section 722, in order to:

> . . . give the Federal courts discretion to award attorneys' fees to prevailing parties in suits brought to enforce the civil rights acts which Congress has passed since 1866. . . .[10]

In passing section 1988, the Congress recognized that "in the large majority of cases, the party or parties seeking to enforce such rights will be the plaintiffs or plaintiff-intervenors. However, in the procedural posture of some cases, the parties seeking to enforce such rights may be the defendants and/or the defendant-intervenors."[11] This is the

[10]S. Rep. No. 94-1011, 94th Cong., 2nd Sess. 2, *reprinted in* [1976] U. S. Code Cong. and Ad. News 5909, 5909.

[11]*Id.*, at 5912.

only mention of defendant-intervenors in the history of the Act, and nowhere does it deal directly with the *liability* of defendant-intervenors for attorneys' fee awards.

It should be stressed, however, that section 1988 is permissive, unlike certain other federal statutes which provide for mandatory recovery of attorneys' fees.[12] That Congress left the awarding of attorneys' fees under this statute to the court's discretion implies that it did not wish the courts to impose an automatic award. According to the House Report, Congress intended the courts to exercise that discretion so that it would "not deter plaintiffs from seeking relief under these statutes, and yet will prevent their being used for clearly unwarranted harrassment purposes".[13]

The policy articulated by the Congress and the protections to public interest plaintiffs afforded by the courts demand an analogous standard for defendant-intervenors. Thereby, a party who intervenes in good faith to promote a relevant viewpoint on the defendant's side would be protected from the crushing burden of additional attorneys' fees. The deterrent effect upon future public interest actions would be avoided for all but clearly unwarranted intervention. Prospective good faith intervenors would be protected as well as prospective plaintiffs in their freedom of expression before the courts.

[12]*See, e.g.*, 15 U.S.C. §15 (mandatory recovery in treble damages anti-trust actions); 29 U.S.C. §216(b) (recovery under the Fair Labor Standards Act); 15 U.S.C. §1640(a) (Truth in Lending Act).

[13]H. R. Rep. No. 94-1558, 94th Cong., 2nd Sess. 6-7 (1976).

CONCLUSION

The judgment of the lower court is in error because it taxes attorneys' fees against intervenors under authority of section 1988 when, in fact, they were not guilty of any prerequisite state action under section 1983.

Independent of this statutory argument, the lower court's decision violates the intervenors' protected freedom of speech and discourages public interest groups from contributing to decisions of public policy. Both the courts and the Congress have sought to encourage good faith representation of relevant public interests.

For these reasons, the judgment of the lower court, with respect to the attorneys' fee award against intervenors, should be reversed.

Respectfully submitted,

MOUNTAIN STATES LEGAL FOUNDATION
In its own name and on behalf of
Southeastern Legal Foundation
Mid-America Legal Foundation
Great Plains Legal Foundation and
Mid-Atlantic Legal Foundation

James G. Watt
Maxwell A. Miller
1845 Sherman Street, Suite 675
Denver, Colorado 80203
(303) 861-0244